United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with affidavit of mailing

74-2518

To be argued by
BERNARD J. FRIED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2518

UNITED STATES OF AMERICA,
Appellee,

—against—

GARY WARREN, a/k/a MICHAEL CHUNN,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Appellant, Gary Warren, also known as Michael Chunn, appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered October 18, 1974 following a plea of guilty to a charge of conspiracy to violate the federal narcotic laws (T. 21 U.S.C. §§ 846 and 963). He was sentenced to a prison term of six years, to run concurrently with a sentence imposed by the United States District Court for the Southern District of Florida. He is currently incarcerated. Appellant's plea of guilty was entered following the denial, after a hearing, of his motion to dismiss the indictment on the broad ground that he had been illegally expelled from Brazil and sent to the United States. The Government expressly consented to preserving appellant's appeal.

On this appeal, appellant contends for the first time that the District Court should have divested itself of jurisdiction where appellant, an American citizen, who admittedly was not physically mistreated, was arrested in Brazil by Brazilian authorities who stated that they were acting on information that he was wanted in the United States for murder as well as narcotics trafficking. This partially incorrect information (appellant was not wanted for murder), so the argument runs, constituted a fraud which invalidates the jurisdiction of the District Court.

Statement of the Case

(1)

On November 1, 1973, appellant was indicted in the Eastern District of New York, along with nine other persons, for conspiring to import, possess and distribute cocaine. The term of the conspiracy was alleged to have been from September, 1972 until the filing of the indictment. On the day the indictment was filed, Judge Anthony J. Travia issued a bench warrant commanding appellant's arrest.

On June 16, 1974, appellant was arrested at John F. Kennedy International Airport by special agents of the Drug Enforcement Administration. Earlier that day, appellant had been expelled from Brazil, where he had been living under an assumed name, and in the custody of Brazilian agents, placed on board an airplane due to arrive in New York City. He was arraigned the next day before Judge Jack B. Weinstein, to whom the case had been assigned under the individual assignment system.

On June 24, 1974 appellant's counsel advised Judge Weinstein that his client was disposed to plead guilty but that he wished to explore the possibility of also disposing of other charges against him in Florida and California. Government counsel was aware of these efforts and, speak-

ing on behalf of both, defense counsel requested ". . . a little bit more time . . . to work out the different entanglements that the defendant has in California and Miami and maybe save the court ultimately some time and trouble" (Transcript of June 24, 1974, p. 5). The matter was then adjourned to the next day. Defense counsel did not inform the Court that appellant intended to contest the legality of his expulsion from Brazil, nor had any formal motion papers, raising this issue, previously been filed.

The following day, the parties appeared before Judge Weinstein and advised the court that, although there had been no multi-jurisdictional coordination of the charges against appellant, there would nonetheless be a plea of guilty to the Eastern District indictment (3-4).* Counsel requested, however, that before any plea be taken that a hearing be held to determine "whether or not the manner in which [appellant] was brought into this country comes under the [*Toscanino*] case." ** Defense counsel, other than expressing a vague belief that appellant "was denied due process . . . when brought in in the manner he was" (*id.*) offered no specific allegations, but stated that he "would like to preserve that issue on appeal . . ." (*id.*).*** Judge Weinstein then offered appellant the opportunity to, as his counsel stated, "[make] out a *prima facie* case" (5) which, if successful, would put the Government to its proof. Government counsel stated that, if it came to that, cables would have to be obtained as well as contact made with the Brazilian Government (4-5).

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* Page references in parenthesis refer to the transcript of June 25, 1974. That transcript has been reproduced in the Government's Appendix and references thereto are to the original pages.

** *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir.), *petition for rehearing en banc denied*, 504 F.2d 1380 (1974).

*** Counsel made no claim that appellant had been expelled from Brazil through "fraud" much less that the specific fraud lay in the alleged false impression of the Brazilian authorities that appellant was wanted in the United States for murder as well as drug dealing.

Following a short recess, appellant took the witness stand and testified to the following:

In November 1973, appellant, a twenty-eight year old United States citizen, and his wife had been living in Bogota, Colombia, for approximately thirty days (44, 17). Appellant was using an American passport in the name of "Walter Smith" (17). At about that time Colombian agents, accompanied by persons who, according to appellant "looked American", went to his house and sought to arrest him (8, 15-16). Appellant closed the door of his house on the hand of one of the Colombian agents, catching the agent's finger in it, and escaped through the back door (16, 20-21).

Appellant then traveled to Ecuador using another false passport, this time in the name "Luis Bruno Alcorta" (18). He remained in Ecuador for approximately two weeks and traveled to Brazil via Peru, arriving in Rio de Janeiro, Brazil on January 1, 1974. Using the "Luis Bruno Alcorta" passport, appellant obtained a Brazilian document which permitted him to work (21-23).

Approximately six months later, on the morning of June 12, 1974, five Brazilian police officers came to his apartment and arrested him while he was asleep in bed (10, 26). He was handcuffed and told that "they had been notified by the American authorities that [he] had murdered an American agent and also had been trafficking" (10, 26). Appellant was then taken to the "Central Office" in Rio de Janerio where he was questioned for approximately six hours to determine his identity (10). He was not questioned concerning narcotics (30). Moreover, this was the only time that he was interrogated while in Brazilian custody (32).

Appellant testified that he was not physically mistreated and that he had made no statement to the Brazilians (11). However, he testified that he was told that if he did not tell

the Brazilians his correct identity, his wife, then eight months pregnant, would be incarcerated (11-12). Despite this alleged threat, he never admitted his true name (30).

After this initial interrogation, appellant was taken to a detention facility used for persons awaiting court processing (31). After two days there, he was brought to police headquarters for fingerprinting and photographing following which he was then returned to detention. On one occasion, while in detention, an American Vice-Consul came into the jail, looked at him, and left without saying anything (12). After another two days, he was taken by two Brazilian agents to the airport, handcuffed and placed aboard Pan American Flight No. 201 destined for John F. Kennedy International Airport (12-14). There had been no Brazilian deportation hearings because, as appellant testified, he was told that if his pregnant wife had her baby in Brazil, he could not be "extradited" (32).

Aboard the airplane, accompanied by two Brazilian agents, he remained handcuffed (14, 32). Beyond the discomfort occasioned by the handcuffs, appellant was not physically harmed by the Brazilian authorities (32-33). Upon his arrival at John F. Kennedy International Airport, appellant was arrested by special agents of the Drug Enforcement Administration (15).

At the conclusion of appellant's testimony, Judge Weinstein, having given "the maximum possible weight to [appellant's] testimony" (41), found as follows:

> The facts as I find them now are that the defendant was in Colombia illegally. He was using a false passport. That Colombian Agents were seeking to question him. That he used violence on one Colombian Agent and he escaped from Colombia, undoubtedly in violation of the criminal laws of Colombia.
>
> * * * * *

It was perfectly justified I think, assuming there were United States Agents involved which I am not sure about, but assuming there were, a false United States Passport was being used and it was appropriate for United States Agents to be cooperating with Colombian Agents in such an investigation of the violation of both Colombian and American criminal law. Certainly no improper conduct on the part of the American or Colombian Agents is shown.

The defendant then went to Ecuador. He was in Ecuador in violation, undoubtedly, of the Ecuadorian criminal law because he was using a false passport and gained entry into that country using a false passport.

He entered Brazil using a false passport in violation of the laws of Brazil. He also obtained a false work permit, undoubtedly in violation of the criminal laws of Brazil. It was perfectly appropriate for him to be investigated by Brazilian Authorities and to be taken in for questioning. Having entered the country illegally and being there illegally it was appropriate for him to be expelled. He had no business being in Brazil under a false passport and it would have been appropriate, I think under the laws of most civilized nations to handle the matter in just that way.

The defendant had no right to be in the country and had falsely entered, that is he had entered using false credentials. They had a right to put him on the plane to send him out and since he was an American Citizen the place to send him was back to America. I think that would [be] standard practice throughout the world.

There is no indication at all that the American Authorities participated in any of the activities in Brazil and it was perfectly appropriate for the

> Brazilian Authorities to contact American Authorities by telephone, as your client has testified, and the defendant has testified, to determine whether there was a man like Alcorta or Mr. Smith or whether he was in fact Mr. Warren or Michael Chunn. No physical violence was used at any time.
>
> Lack of a hearing was apparently a result not of an attempt to deny the defendant any of his Brazilian rights, whatever they might have been, but rather an attempt to show some compassion towards his pregnant wife.
>
> I do not see in what way the American Authorities can be said to be at all at fault or to have violated this defendant's Constitutional Rights (33-37).

In addition, Judge Weinstein, during the course of the legal argument which followed, found that there was "no basis" for counsel's statement that appellant had "left" Colombia "partly through the instigation of American authorities" (37). Judge Weinstein also found that appellant had been living in Brazil under "a fraudulent passport and using fraudulent work papers" (37), and that appellant was "using a false Ecuadorian visa" (39). Finally, Judge Weinstein found that there had been ". . . no showing whatsoever that anything illegal was done by American officials . . ." (40); that appellant "was not brought in by abduction" and that "[n]o treaty was violated" (42). Then, after reading the following language in *Toscanino*: (500 F.2d at 280 n. 9)

> "The Constitution, of course, applies only to the conduct abroad of Agents acting on behalf of the United States. It does not govern the independent conduct of foreign officials in their own country. Whether or not the United States Officials are substantially involved or foreigners are acting as their agents or employees, is a question of fact to be resolved in each case."

Judge Weinstein stated:

> I find, as a matter of fact, that United States Officials were not substantially involved. (42)
>
> * * * * *
>
> Procedures used by the Brazilian authorities were in fact not shocking and did not violate any concept of Roachin [sic]. This defendant's rights under the Constitution of the United States were not violated. This Court has jurisdiction to proceed in this case. (43)

At no time during the foregoing proceedings did appellant's counsel urge that appellant's expulsion was the product of the "fraud" which he nows asserts on appeal.

ARGUMENT

Appellant's contention that his expulsion from Brazil was procured by fraud is neither cognizable on this appeal nor, if cognizable, meritorious.

Appellant now contends, based upon a passing comment in his testimony, that the District Court had no jurisdiction over him by virtue of this Court's decision in *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir.), *petition for rehearing en banc denied*, 504 F.2d 1380 (1974). Taking his testimony at full breadth, which we agree must be done, he argues that Brazilian authorities would not have expelled him to the United States had they not been under the false impression that he was wanted in the United States for murder as well as his narcotics activities. Accordingly, he contends that such a "fraud" falls within this Court's decision in the *Toscanino* case. We disagree.

Initially, it should be pointed out that appellant now presses a claim that was neither raised nor argued in the District Court. For the first time, he contends that his

expulsion from Brazil was illegal because American authorities had allegedly furnished false information to Brazilian authorities. Appellant did testify, at the hearing, that he had been told by the arresting Brazilian police that they were informed by American authorities that he was wanted in the United States for murder and narcotics trafficking. However, at no time during the making of the oral motion to dismiss the indictment or during argument of the motion was this testimony mentioned or relied upon. Moreover, any claim of fraudulent behavior by American authorities is absent from the record below.

Indeed, the sole ground for the motion in the District Court was that appellant had been brought into this country in a manner that somehow, though unspecified, violated the standards set forth in *United States* v. *Toscanino, supra.* At the argument in the District Court, it was urged that the illegality consisted in the failure of Brazil to follow regular procedures (40). Therefore, since the issue on this appeal was not raised and treated below appellant should be precluded from raising it on appeal. See *United States* v. *Indiviglio,* 352 F.2d 276, 279-280 (2d Cir. 1965); *United States* v. *Luster,* 342 F.2d 763, 764 (6th Cir. 1965); *Johnston* v. *United States,* 254 F.2d 239, 241 (8th Cir. 1958); *Morales* v. *United States,* 373 F.2d 527 (9th Cir. 1967); *Johnson* v. *Patterson,* 367 F.2d 268 (10th Cir. 1966).

Even if this Court should take cognizance of appellant's belated argument, it is clear that this Court's recent decision in *United States ex rel. Lujan* v. *Gengler,* — F. 2d — (2d Cir. Slip opinions, 1197; January 8, 1975) disposes of appellant's argument.*

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* Appellant's brief was written prior to the date that *Lujan* was decided and appellant has not sought leave to file a supplemental brief analyzing *Lujan.* The argument of this appeal has been set for February 13. In the event, therefore, that appellant should file a reply brief, the United States respectfully requests a reasonable time in which to respond.

In *Lujan* this Court held that not every abduction is violative of due process (Slip. Op. 1204). According to the *Lujan* analysis, it is only where there is "that complex of shocking governmental conduct," such as was alleged in the *Toscanino* case, involving "the use of torture, brutality and similar outrageous conduct" that a "simply illegal abduction" is converted into one which controvenes due process (Slip Op. 1203-1204). The effect of this opinion was to clarify the *Toscanino* case and to reaffirm the traditional *Ker-Frisbie* rule, except where there is a "set of incidents like that in *Toscanino*" (Slip. Op. 1205).

Consequently, the *Toscanino* dictum, relied upon by appellant, to the effect that since in civil cases, the use of fraud to secure a defendant's presence vitiates jurisdiction, a like result should obtain in criminal cases, is not controlling. Indeed, Lujan himself was lured from Argentina by a trick or fraud employed by American agents. But, and this appears critical to the analysis, there was no accompanying inhumane governmental behavior (Slip. Op. 1200). Therefore, the rule that this civil analogy does not pertain to criminal cases, *In Re Johnson,* 167 U.S. 120, 126 (1896); *United States* v. *Sobell,* 142 F. Supp. 514, 542 (S.D.N.Y., 1956), *aff'd,* 242 F.2d 520 (2d Cir.), *cert. denied,* 355 U.S. 873 (1957), is still viable, absent an allegation of shocking or outrageous governmental conduct.

Finally, Judge Weinstein's findings, supported by the record, that appellant was not brought "in[to the United States] by abduction" (42) and that "[t]here is no indication that American authorities participated in any of the activities in Brazil" (36), renders appellant's argument frivolous. Certainly Brazil is free to expell whomever it chooses and for whatever reasons it chooses. Hence, it is absurd to argue that Brazil would not have expelled appellant had it been known that he was only wanted in the United States for narcotics trafficking and not also for murder. Moreover, there is no claim that Brazil has lodged

a protest or objection to the fact that it allegedly was provided partially erroneous information. By itself, this omission appears fatal. *Cf. United States ex rel. Lujan* v. *Gengler, supra,* at Slip Op. 1206 and n. 8.

CONCLUSION

The judgment of conviction should be affirmed.

February 3, 1975

Respectfully submitted,

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AFFIDAVIT OF MAILING

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COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

deposes and says that he is employed in the office of the United States
District of New York.

That on the 3rd day of February 1975 he served t
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed t

William J. Gallagher, Esq.
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of Kings, City of New York.

Lydia Fe
LYDIA FERNANDEZ

Sworn to before me this
3rd day of February 19 75

Certificate filed in Kings County
Commission expires March 30, 1976

..... being duly sworn,

Attorney for the Eastern

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